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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

AUGUST CLIFF, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 614, October Term, 1902. No. 221, October Term, 1903.
FREDERICK J. SCHICK, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Northern District of Illinois.	No. 615, October Term, 1902. No. 222, October Term, 1903.
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LEO W. MCCRAY, *Plaintiff in error,* vs. THE UNITED STATES. In error to the District Court of the United States for the Southern District of Ohio.	No. 301, October Term, 1903.

BRIEF FOR PLAINTIFFS IN ERROR.

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Washington, October Term, 1903.

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[18,842. 18,843. 18,844. 18,952.]

OLEOMARGARINE TAX CASES.

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BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

The above entitled cases draw in question the constitutionality of certain provisions of the act of Congress commonly called the "Oleomargarine Act," and en-

titled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine," approved August 2, 1886, as supplemented by section 41 of the act of October 1, 1890, and as amended by the act of May 9, 1902 (24 Stat. 209, c. 840; 26 Stat. 621, c. 1244, § 41; 32 Stat. 193, c. 784), on the ground that they interfere with the reserved power of the States to regulate their internal commerce, deprive the individual of liberty and property without due process of law, and confer final judicial power upon an administrative officer.

The plaintiffs in error *Cliff*, *Schick* and *Broadwell* were prosecuted by information in the District Court of the United States for the northern district of Illinois (*Ex parte Wilson*, 114 U. S. 417, 425; *Lees* v. *United States*, 150 U. S. 476, 479) for the offense of having purchased or received for sale oleomargarine which had not been "stamped according to law" under section 11 of the act. In the case of *McCray*, the government instituted in the District Court of the United States for the southern district of Ohio a civil suit under the same section of the act, for the recovery of the penalty therein provided. *Helwig* v. *United States*, 188 U. S. 605, 610.

The title of the amendatory act defines the general object of the legislation as follows (32 Stat. pt. 1, p. 193):

> "An Act to make oleomargarine and other imitation dairy products subject to the laws of any State, or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an Act entitled 'An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, im-

portation, and exportation of oleomargarine,' approved August second, eighteen hundred and eighty-six."

The act, as amended, consists of 21 sections. Section 1 defines butter as follows (24 Stat. 209):

> "That for the purposes of this act the word 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and *with or without additional coloring matter*."

Section 2 defines oleomargarine as follows (24 Stat. 209):

> "That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil, *annotto, and other coloring matter*, intestinal fat, and offal fat, *made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter*."

Section 3 imposes special taxes on manufacturers, wholesale dealers and retail dealers in oleomargarine, and section 4 prescribes heavy penalties for their nonpayment. Section 5 provides for regulation of the business of manufacturing oleomargarine by the Commissioner of Internal Revenue, places the conduct of such business under "surveillance of officers and agents" of the Commissioner, and requires each manufacturer to give a bond in the penal sum of not less than five thousand dollars, which "may be increased

from time to time, and additional sureties required at the discretion of the collector, or under instructions of the Commissioner of Internal Revenue." Section 6 provides for the packing, marking, stamping and branding of oleomargarine by manufacturers as prescribed by regulations of the Commissioner with the approval of the Secretary of the Treasury, and provides penalties for the enforcement of such regulations. Section 7 requires the manufacturer of oleomargarine to affix to each package of the article sold or offered for sale the usual internal revenue label containing a caution not to use the same package or the same label thereon again.

Section 8, as amended by section 3 of the act of May 9, 1902, imposes the tax in question in the following language (32 Stat. pt. 1, p. 194):

> "That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound: *Provided, That oleomargarine is free from artificial coloration that causes it to look like butter of any shade of yellow and the tax shall be one-fourth of one cent per pound.*"

Section 9 provides for assessment of taxes on oleomargarine which has been sold or removed for sale "without the use of the proper stamps." Section 10 imposes a tax of fifteen cents per pound upon imported oleomargarine in addition to the duty. Section 20 prescribes the penalty judicially imposed in the cases at bar, as follows (32 Stat. 211):

> "That every person who knowingly purchases or receives for sale any oleomargarine which has

...any liquor furnished or stamped according to law shall be liable to a penalty of fifty dollars for each such offense."

Section 12 imposes a penalty for purchasing or receiving for sale any oleomargarine from any manufacturer who has not paid the special tax. Section 13 provides for the destruction of stamps on empty packages. Section 14 provides for the employment of chemists and microscopists by the Commissioner of Internal Revenue for decision by said Commissioner as to whether any oleomargarine is deleterious to health, for an appeal from such decision to a board "composed of the Surgeon-General of the Army, the Surgeon-General of the Navy, and the Commissioner of Agriculture," whose decision shall be final, and also confers power on the Commissioner of Internal Revenue as follows:[1] [2]

> "And such Commissioner is authorized to establish such regulations, examine witnesses, and require proofs which may be necessary for the ingression to examine such cases as he may deem advisable, and his decision in matters of fact in such cases shall be final."

Section 15 provides for inspection by the United States of all oleomargarine found not to be deleterious to health or not stamped or marked as provided by the act, and also forbids the removal or delivery of stamps on packages of oleomargarine. Section 16 provides for removal of oleomargarine for export without tax. Section 17 makes any manufacturer who "defrauds or attempts to defraud the United States of the tax on the oleomargarine produced by him or any part thereof" with forfeiture of his factory, manufacturing apparatus and all oleomargarine

and raw material found on the premises, and by fine not exceeding five thousand dollars and imprisonment for not more than three years. Section 18 punishes by a penalty of one thousand dollars, and forfeiture of all oleomargarine owned by the offender if he be a manufacturer, all failures to comply with the act not otherwise punished. Section 19 provides "that all fines, penalties and forfeitures imposed by this act may be recovered in any court of competent jurisdiction." Section 20 provides "that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act." Section 21 of the original act provides for its going into effect ninety days after its passage, and the act, as amended (under the last section of the act of May 9, 1902), went into effect on July 1, 1902.

On the trial of each case, it was contended by the defendant that, in so far as this act imposes a tax of ten cents per pound on oleomargarine containing "artificial coloration that causes it to look like butter of any shade of yellow," it was in contravention of the Constitution of the United States and the amendments thereto, because it constituted an invasion of the powers reserved to the several States and deprived him and the oleomargarine manufacturers and dealers in the United States of liberty and property without due process of law. In the *Cliff* and *McCray* cases it was contended also that the act was unconstitutional in so far as it authorizes the Commissioner of Internal Revenue "to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in con-

tested cases are to be taxed under this act," and provides "that his decision in matters of taxation under this act shall be final," on the ground that it delegates to an inferior administrative officer the power finally to determine an essentially judicial question. Notwithstanding these contentions, judgment was rendered in favor of the government imposing the statutory penalty of fifty dollars in each case (*Cliff* record, pp. 22–24; *Schick* record, pp. 19–21; *Broadwell* record, pp. 19–21; *McCray* record, pp. 5–7). Thereupon, the cases were brought direct to this court by writ of error under authority of section 5 of the judiciary act of March 3, 1891, as involving the construction or application of the Constitution of the United States and also as cases in which the constitutionality of a law of the United States was drawn in question. 26 Stat. 827, c. 517; *Motes* v. *United States*, 178 U. S. 458, 466; *Fairbank* v. *United States*, 181 U. S. 283, 284.

In the *Cliff* case, the Government showed that the defendant was a general grocer and retail dealer in oleomargarine in Chicago; that on December 22, 1902, he had in his possession a ten pound package of oleomargarine of a color resembling June butter and bearing a tax-paid stamp at the rate of one-fourth of one cent per pound; that the article was composed of oleo oil, neutral lard, cotton-seed oil, milk, common salt and palm oil; that the color of June butter was imparted to it by the palm oil it contained; that the oleomargarine had been manufactured in the month of December, 1902, by Wm. J. Moxley, Incorporated, factory No. 5, at the corner of Clinton and Randolph Streets,

in the City of Chicago, State of Illinois; that the package was put up, marked, stamped and branded in every respect in accordance with the acts of Congress relating to oleomargarine and the regulations of the Secretary of the Treasury and the Commissioner of Internal Revenue except that it bore only a tax-paid stamp of one-fourth of one cent per pound, and that the defendant admitted to the collector at that time that he purchased and received from the Moxley Company the oleomargarine in question for the purpose of sale as oleomargarine, knowing its character and ingredients and the amount of tax paid thereon (*Cliff* record, p. 8).

In the *Schick* case substantially the same showing was made, except that it appeared that the package of oleomargarine involved in that case admittedly contained 'artificial coloration,' namely, Wells-Richardson's Improved Butter Color, and that the package bore only a tax-paid stamp at the rate of two cents per pound (*Schick* record, p. 8).

In the *Broadwell* case the same showing as in the *Schick* case was made, except that the package of oleomargarine bore no stamp and no tax had been paid on it (*Broadwell* record, p. 8).

The operation and effect of the act were shown by undisputed evidence offered and adduced on behalf of the defendant in each case, as follows:

Oleomargarine is designed to be used as a substitute for butter and to that end is colored as butter is colored. There is substantially no difference between yellow oleomargarine and yellow butter. They are identical as to the chemical elements of each, except only a slight difference in proportion. They each con-

tain olein, stearin, palmatin, butyrin and coloring matter. The first three elements olein, stearin and palmatin, are the principal components, are exactly the same in oleomargarine and butter, and constitute more than 90 per cent. of the finished product in both cases. The amount of butyrin varies slightly, being about six per cent. in good butter, and somewhat less in oleomargarine, depending upon the amount of milk, cream or butter used in its manufacture, as butyrin is found only in milk, cream or butter. The amount of coloring matter in butter varies at different periods and according to the condition and food of the cows. It is universally colored throughout the year to a uniform shade of yellow, but requires more color in the winter, when it is white, than in the spring, when it has some natural color, especially if the cows have been fed on green grass or clover. There is nothing, however, in these slight differences which renders butter more wholesome or digestible than oleomargarine as an article of food, and the coloring matter used in both cases is harmless. Yellow oleomargarine and yellow butter are used for the same identical purpose, and compete with each other in the market. The reason for coloring these products is the same in both cases: because the consumers demand it. A necessary element of the marketability of each is a certain shade of yellow which must be imparted to the product before it can be sold. There is no market either for uncolored oleomargarine or uncolored butter, except, in the case of oleomargarine, as a substitute for lard, and, in the case of butter, a small quantity of sweet unsalted butter is sold to supply the Jewish settlements. It costs less to produce

oleomargarine than it does to produce butter, and to this extent, oleomargarine successfully competes with and tends to cheapen butter; but this difference in cost is not great enough to enable the colored oleomargarine to be sold after paying the tax of ten cents per pound except occasionally when the price of butter is abnormally high (*Cliff* record, pp. 8–21; *Schick* record, pp. 8–19; *Broadwell* record, pp. 8–19).

Prior to July 1, 1902, when the act of May 9, 1902, went into effect, the business of producing and selling yellow oleomargarine had been able to compete with the yellow butter industry to a very considerable extent. It was shown that the Moxley plant, at which the packages involved in these cases were manufactured, had been in operation since 1884, supplying the trade in various parts of the United States with yellow oleomargarine designed to be used as a substitute for butter, and had grown to a capacity of between three and four million pounds per month. Prior to July 1, 1902, the entire output of this factory was all artificially colored as butter is colored. Thereafter, it could not be manufactured and sold at a profit after paying the tax of ten cents per pound, and for the first five months none of the colored article was produced or sold. In December, 1902, owing to the abnormally high price of butter, the Moxley Company was enabled to sell 37,594 pounds of colored oleomargarine, as compared with an output of about 2,000,000 pounds per month prior to July 1; but when butter fell again to its normal price, oleomargarine bearing the tax of ten cents per pound was practically unable to compete with it. The uncolored product, so far as could be ascertained, was sold for cook-

ing purposes, but only in comparatively small and uncertain quantities, because the relative cost of production was such that oleomargarine could not ordinarily compete with lard, although more desirable than lard for cooking purposes (*Cliff* record, pp. 18–20). Amundsen, a retail dealer in Chicago, who obtained his supplies from this factory, had worked up a business among the laboring classes of Chicago amounting to sales of 2,600 pounds per week. The customers "knew that it was oleomargarine and not butter and they bought it because it was cheaper than butter" (*ib.* p. 17). But when the ten cent tax was to be paid it was cheaper to buy butter, and they would not have the uncolored article. As a consequence, to quote the witness, "every customer I had quit" (*ib.*). Thereafter, he supplied a part of the trade with butter for table use, selling white oleomargarine only for cooking purposes (*ib.* pp. 16–17). Izard, a restaurant proprietor in Chicago, furnished yellow oleomargarine almost exclusively to his patrons, who had no objection to it so long as it had the proper color. After July 1, 1902, he could not use it because it was white and the addition of ten cents per pound to the price of colored oleomargarine resulted in the use by him of colored butter almost exclusively. The uncolored oleomargarine he could use only for cooking in place of lard (*ib.* pp. 17–18).

In the *Cliff* and *McCray* cases, where the package was tax-paid at the rate of one-fourth of one cent per pound, there was an additional question as to whether the package contained 'artificial' coloration within the meaning of section 8 of the act by reason of

the admixture of palm oil or colored butter. Upon this issue also the facts were undisputed. In the *Cliff* case, the government showed that the article was of the color of June butter, and that this color was imparted to it by the admixture of palm oil in its manufacture (*Cliff* record, p. 8). The defendant showed by competent testimony that palm oil is a vegetable oil derived from the fruit of a certain kind of palm which grows in East Africa, that it is a digestible and edible oil, containing all the chemical constituents of butter, except butyrin, that it is used by the natives of the country where it is produced as an article of food, that it is reddish-yellow in appearance and a very small proportion of it is sufficient to produce what is considered a desirable color in oleomargarine, that there is little, if any, difference between the taste of oleomargarine made in this way and the taste of butter, that it is quite as digestible as butter and is very cheap, that the oleomargarine thus produced is substantially the same product as good butter, and that the nature of palm oil is such that, by the process of refining, its intense color may be partially eliminated, thus rendering its use in considerable quantities desirable in the manufacture of oleomargarine apart from its yellow color (*ib.* pp. 10–13). These facts being wholly undisputed, the conviction was based on the assumption that the question thus presented had been foreclosed by the final decision of the Commissioner of Internal Revenue, who had ruled that palm oil in oleomargarine does constitute 'artificial' coloration (*ib.* pp. 9, 10), and had instructed the prosecuting witness, a Deputy Collector of Internal Revenue,

that its use would subject the product to the tax of ten cents per pound (*ib.* p. 8).

In the *McCray* case the government alleged in its complaint that the defendant had purchased for sale as a retail dealer a package of oleomargarine containing "coloring matter that caused it to look like butter of a certain shade of yellow," and bearing a tax-paid stamp at the rate of only one-fourth of one cent per pound (*McCray* record, p. 2). These allegations were admitted by the defendant, who averred by way of defense that the coloring matter contained in the article was that contained in the creamery butter used by the manufacturer of the oleomargarine as one of its elementary and necessary ingredients, according to a formula used in the course of business, which creamery butter contained Wells-Richardson's improved butter color, a harmless substance, universally used in the United States in the manufacture of butter, for the purpose of imparting a deep yellow color, that said creamery butter was purchased in the open market for said purpose, that no additional or other coloring matter of any kind whatsoever was used or introduced into said oleomargarine, that said oleomargarine contained nothing but oleo oil, neutral lard, creamery butter, milk, cream and common salt, and was wholesome and nutritious and free from any deleterious or injurious ingredient; that said package had been "packed, marked, stamped, branded and labeled, in compliance with all the provisions of said acts and with all the regulations thereunder prescribed by the Commissioner of Internal Revenue and the Secretary of the Treasury," that "the cost of manufacture of the wholesome and

nutritious oleomargarine like that contained in said package is such that it cannot be sold in competition with butter if the tax of ten cents per pound be imposed and paid," and that there is little demand in the United States for either uncolored butter or uncolored oleomargarine (*ib.* pp. 3–5). These facts were admitted by the demurrer of the government which the court sustained (*ib.* pp. 6, 7).

The historical facts concerning oleomargarine will be found in Encyc. Brit., vol. 17, p. 760; Century Dict. & Cyc., vol. 5, p. 4101; Oleomargarine Regulations, U. S. Int. Rev., June, 1902, pp. 11–15; "The Oleomargarine Bill" (Gov. Print., 1901), *resumé* pp. 815–885; *People* v. *Marx*, 99 N. Y. 377, 382–383; *People* v. *Arensberg*, 105 N. Y. 123, 129–132; *People ex rel. Moxley* v. *Pease*, 30 Chicago Leg. News, No. 34; *Ex parte Scott*, 66 Fed. Rep. 45, 48; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 8–12; *In re Brundage*, 96 Fed. Rep. 963, 965.

Shortly after the Franco-Prussian war of 1870–1871, the French government decided that it was of the utmost importance that some cheap and wholesome substitute for butter should be discovered for the relief of the poor in the great cities and manufacturing centers who were unable to obtain butter. To that end a prize was offered to scientists, and the result was the invention of oleomargarine by M. Mege-Mouries (Encyc. Brit., Vol. 17, p. 760). This invention was immediately recognized and hailed as a boon to humanity, and soon sprang into use all over the world. It was at first made by treating pure beef fat by a certain process. Afterwards, in order to make the product more wholesome and

digestible as well as more palatable, various modifications in the process were from time to time introduced. The present method is to take selected fat of the steer, reduce it to oil, which is called 'oleo oil,' and then mix and work this oleo oil with natural lard, milk, cream and butter. Oleomargarine furnishes a very valuable by-product of the slaughter houses and packing establishments, and the effect has been to utilize what had before gone to waste, to increase the value of beef cattle and to decrease the price of butter. It has practically no commercial use or value, except as a cheap and wholesome substitute for butter and as such it necessarily competes with butter. If it is not allowed to be used as a substitute for or to compete with butter, the discovery is of no practical utility to mankind.

The commercial character of oleomargarine is described by Mr. Justice Peckham in the case of *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 8–12. The growth and extent of the use of oleomargarine in every civilized country is part of the common history of the times. The official records of the United States government show that the output during the twelve months ending June 30, 1900, amounted to 107,045,028 pounds, an average of 8,920,419 pounds per month, and that the revenue collections from oleomargarine in 1900 were $2,543,785.[1] On the other hand, the same records show the yearly sales of butter to have been 1,492,699,143 pounds;[2] so that the production of oleomargarine was only about seven per cent. of the amount of butter manufactured. As oleomargarine was invented and is

[1] Senate Doc. 168, 57th Cong., 1st session.

[2] Twelfth Census, 1900, vol. IX, Manufactures, pt. III, p. 517.

used commercially almost wholly as a substitute for butter and in competition with butter, it is desirable that its flavor and color should be similar to the flavor and color of butter, and hence the necessity for the use of flavoring and coloring matter, being the same as that used to color and flavor butter. Oleomargarine is colored yellow for exactly the same reason that butter is colored, namely, to meet the taste and demand of the public.

In 1886 Congress determined to tax oleomargarine and regulate its manufacture. The act of August 2, 1886, contained a definition of oleomargarine and of butter which recognized the use of coloring matter as an element in the manufacture of both articles. It treated all oleomargarine, no matter how colored, as one article for the purposes of taxation. The tax then imposed was at the rate of two cents per pound, and between November 1, 1886, and the close of the year 1901 more than $21,000,000 had been paid as taxes under this law. The act of Congress of May 9, 1902, does not change these definitions, but oleomargarine is classified according to color, and that "free from artificial coloration that causes it to look like butter of any shade of yellow" is taxed at one-fourth of one cent per pound, while that containing "artificial coloration that causes it to look like butter of any shade of yellow," is taxed at ten cents per pound, or *forty* times as much.

The discussion in this brief will proceed upon the face of the act of Congress in question and its undisputed practical operation and effect, which is to prohibit the sale of yellow oleomargarine. No quotations will

be made from the debates in which the real purpose of the enactment may have been declared by individual members, because counsel are apprehensive that such debates are not admissible. *Knowlton* v. *Moore*, 178 U. S. 41, 72. Under the decisions, the question is most perplexing. The court frequently does refer to these debates for information, and yet has often declared that they are not admissible to show purpose or motive or to determine the intention of particular legislation. The true rule appears to be that debates may be referred to in order to show the occasion for the legislation and the circumstances surrounding its enactment, but not in order to ascertain the individual motives or purposes of its promoters or to control the meaning of the language used. As, in the present cases, reference to the debates would involve a showing of individual motives and purposes calculated, as it might be charged, to excite prejudice and sympathy, which counsel are not satisfied constitute proper elements in the strictly legal judgment which the court is required to render, they will not be referred to in argument. It is enough to say that the supposed "exigencies which led to the passage of the act" and "the reasons for fixing the duty at this amount" may be ascertained by examining the debates.[1] If the court shall reach the conclusion that it will consult these evidences of legislative intent and purpose, the references in the margin may be of convenience.[2]

[1] *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474; *Aldridge* v. *Williams*, 3 How. 9, 24; *Jennison* v. *Kirk*, 98 U. S. 453, 459; *Platt* v. *Union Pacific R. R. Co.*, 99 U. S. 48, 64. See also *Holy Trinity Church* v. *United States*, 143 U. S. 457, 463; *The Delaware*, 161 U. S. 459, 472; *Dunlap* v. *United States*, 173 U. S. 65, 75. *United States* v. *Freight Association*, 166 U. S. 290, 318, 360.

[2] Congressional Record, 57th Cong., 1st sess., vol. 35, part 2, pp. 1251 *et seq.*, 1299, 1310, 1544; part 3, pp. 3192, 3195, 3196, 3246, 3270–3274, 3280, 3322, 3452, 3458, 3466, 3467, 3499-3514, 3556, 3595-3597.

ASSIGNMENT OF ERRORS.

Error in refusing to hold that the provisions of the act of Congress of August 2, 1886, as amended by the act of Congress of May 9, 1902, were in contravention of the Constitution of the United States and the amendments thereto, in that—

(1) They constitute an encroachment upon and interference with the powers reserved to the several States;

(2) They deprive the plaintiffs in error of liberty and property without due process of law;

(3) They invest an administrative officer with the power finally to determine essentially judicial questions.

Error in striking out and refusing to consider proper evidence offered and received on behalf of the defendants below in the first three cases, tending to prove:

(1) That oleomargarine is a substitute for and competes with butter, that the market demand for and commercial value of both butter and oleomargarine require that they shall have a certain shade of yellow during all seasons of the year, and that there is practically no market either for uncolored butter or uncolored oleomargarine;

(2) That the cost of production of oleomargarine is such that, after payment of a tax of ten cents per pound thereon, it cannot be sold.

The questions presented under these assignments of error may be classified for the purposes of argument under the following heads, viz.:

I. The power of Congress to levy excise taxes on manufactures (pp. 19–28).

II. The internal commerce of the States and the exercise of the taxing power by Congress (pp. 28–52).

III. The restrictions upon the taxing power contained in the Fifth Amendment (pp. 52–70).

IV. The provision of section 14 of the act conferring judicial power upon the Commissioner of Internal Revenue (pp. 70–75).

V. Effect of the invalid amendment upon the original act (pp. 75–76).

I.

THE POWER OF CONGRESS TO LEVY EXCISE TAXES ON MANUFACTURES.

The Constitution of the United States grants to Congress (Art. I, sec. 8) "the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," and directs that capitation and other direct taxes shall be laid in proportion to the census or enumeration, and that duties, imposts and excises shall be uniform throughout the United States. Subject to these two directions, which are not strictly limitations of power but rules prescribing the mode in which the power shall be exercised,[1] the only express limitation in the Constitution, as originally adopted, was that no "tax or duty shall be laid on articles exported from any State."[2]

An examination of the debates in the various conventions to which the Constitution was submitted for ratification and of the writings of that time will show that the subject of federal taxation and the danger of oppression from its exercise was discussed as much as any other fea-

[1] Chief Justice Chase in *Veazie Bank* v. *Fenno*, 8 Wall. 533, at p. 541.
[2] Art. I, sec. 9; *Fairbank* v. *United States*, 181 U. S. 283, 290.

ture, and that some of the States apprehended particular injury from the power to levy excises on manufactures and commodities. It was particularly objected by the opponents of the Constitution that Congress was given power to pass any law which it thought necessary and proper in aid of the powers granted to it. The answer of Hamilton in the *Federalist* was that Congress could not by its mere declaration make that necessary and proper to the execution of its powers which, in its essence, was not necessary and proper. His language was (Ford's ed. No. 78, p. 521):

> "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is a proper and a peculiar province of the courts. The Constitution is, in fact, and must be regarded by the judges, as the fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute; the intention of the people to the intention of their agents."

Notwithstanding this assurance, destined as it was to become an elemental feature of our constitutional jurisprudence,[1] it is well known that the consent of the people in the necessary number of States was secured only upon the pledge that amendments recognizing the reserved powers of the States and protecting the individual against the abuse of the powers granted to the national government would be forthwith submitted. *Barron* v. *The Mayor and City Council of Baltimore*, 7 Pet. 243, 250. In pursuance of this pledge, the first Congress (1 Stat. 97; Rev. Stat. p. 28, note) proposed the first ten articles of amendment to the Constitution, "in order," as recited in the preamble of the resolution, "to prevent misconstruction or abuse of its powers" and for the purpose of adding "declaratory and restrictive clauses." Of these restrictive clauses, the Fifth Article provides that "no person shall . . . be deprived of life, liberty or property, without due process of law," and the Tenth Article provides that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." These amendments are clearly to be regarded of equal force and validity with the provisions of the Constitution itself. As Mr. Justice Shiras, speaking for the court in the recent case of *Prout* v. *Starr*, 188 U.S. 537, 543, 544, said:

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. . . .

[1] *Marbury* v. *Madison*, 1 Cranch, 137, 176-179; *McCulloch* v. *State of Maryland*, 4 Wheaton, 316, 421, 423; *Hepburn* v. *Griswold*, 8 Wall. 603, 614, 615; *Smyth* v. *Ames*, 169 U. S. 466, 527; *Matter of Application of Jacobs*, 98 N. Y. 98, 112.

> It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."

But whether the Fifth and Tenth Amendments constitute limitations upon the taxing power of Congress has never yet been expressly adjudged. The wise rule of our system of jurisprudence which confines adjudications by the courts to actual cases as they arise from time to time, has made the growth of American constitutional law extremely slow, and novel exercises of governmental power are constantly presented which require a renewed exposition of fundamental principles and a re-examination of the distribution of governmental powers contained in the Constitution.[1] For centuries, the principles of the common law have been growing by slow steps to maturity and symmetry, evolving rules of private justice as between man and man, and it is, therefore, hardly astonishing that the growth of constitutional jurisprudence also should be by slow and cautious steps in the application to individual cases of the eternal principles of public justice embodied in the Constitution which protect personal liberty and property against the abuse of the powers of government. Although the Constitution has been in operation for one hundred and fourteen years, this court has not yet adjudged whether there are any qualifications of the power of Congress to levy taxes other than the rules of apportionment and geographical uniformity, except in so far as the instrumentalities of the state governments are concerned.[2] Indeed, it was not until

[1] *Lelaigh* v. *Port of Mobile*, 127 U. S. 640, 648.

[2] *The Collector* v. *Day*, 11 Wall. 113, 124; *United States* v. *Railroad Company*, 17 Wall. 322, 327; *Van Brocklin* v. *State of Tennessee*, 117

May, 1900, in the case of *Knowlton* v. *Moore*, 178 U. S. 41, 92, that the true meaning of the provision "uniform throughout the United States" was definitely settled to be geographical uniformity.[1] In the later case of *Wight* v. *Davidson*, 181 U. S. 371, 377, Mr. Justice Shiras stated in the opinion of the court, referring to a federal statute, that "the constitutional right against unjust taxation is given for the protection of private property," but did not discuss what provision of the Constitution secured that right.[2] And still later, in the case of *Patton* v. *Brady*, 184 U. S. 608, 622, we find Mr. Justice Brewer stating that the rule of geographical uniformity was the only limitation imposed upon Congress by the framers of the Constitution and the people who adopted it in respect of the power to lay excise taxes. Yet, it cannot be supposed that this language was intended to recognize the existence of an unrestrained taxing power, in view of the dissent of the learned Justice in *Knowlton* v. *Moore*, 178 U. S. 41, 110.

From the statement of facts, it appears that the inquiry in each of the cases at bar is confined to the validity of the act of Congress of May 9, 1902, in so far as it operates upon the internal commerce of the States of Illinois and Ohio. The oleomargarine in question was manufactured and sold in Illinois and Ohio by residents of those States and the transaction was confined to

U. S. 151, 178; *Mercantile Bank* v. *New York*, 121 U. S. 138, 162; *Income Tax Cases*, 157 U. S. 429, 584; *Plummer* v. *Coler*, 178 U. S. 115, 117; *Ambrosini* v. *United States*, 187 U. S. 1, 7; *Snyder* v. *Bettman*, 190 U. S. 249, 253.

[1] See, however, Mr. Justice Field's discussion of the provision in *Income Tax Cases*, 157 U. S. 429, at p. 592 *et seq.*

[2] See also *Parsons* v. *District of Columbia*, 170 U. S. 45, 51.

the internal commerce of each State. It is, of course, settled that Congress was not delegated any power whatever to regulate the internal commerce of the States, and that the regulation of such commerce was expressly reserved to the States by the Tenth Amendment. *Gibbons* v. *Ogden*, 9 Wheat. 1, 194, 203; *License Cases*, 5 How. 504, 574, 599; *Passenger Cases*, 7 How. 283, 400; *License Tax Cases*, 5 Wall. 462, 470–471; *United States* v. *Dewitt*, 9 Wall. 41, 44; *Trade-Mark Cases*, 100 U. S. 82, 96–97; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13. That the police power never was surrendered by the States is also a proposition that need not be argued. It is "conceded in all the cases." *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661; see also *In re Rahrer*, 140 U. S. 545, 554, 556; *Plumley* v. *Massachusetts*, 155 U. S. 461, 472; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 11, 13; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558. And the act now before the court, if grounded upon the attempt to regulate the manufacture of dairy products and oleomargarine and their sale in the internal commerce of the States, would be clearly beyond the powers of Congress and unconstitutional. *United States* v. *Dewitt*, 9 Wall. 41, 45; *United States* v. *Fox*, 94 U. S. 315, 320; *Trade-Mark Cases*, 100 U. S. 82, 96; *Covington, &c., Bridge Co.* v. *Kentucky*, 154 U. S. 204, 210; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12, 13; *United States* v. *Boyer*, 85 Fed. Rep. 424, 432.

The provisions of this act, so far as they affect the internal commerce of a State, can, therefore, only be sustained under the power of Congress to tax and to employ necessary and proper means for carrying that

power into execution. It follows that the exact question presented in the cases at bar is whether Congress may prohibit the internal manufactures of the States by means of a prohibitive tax.

The power of Congress to exclude any commodity from interstate commerce or to lay a prohibitive excise tax upon articles transported between States in order indirectly to accomplish that end, need not now be discussed. It will be time enough to consider the subject when a case actually involving that momentous question shall arise, for it would be difficult to suggest one of a graver character or the decision of which would be more far-reaching. Nevertheless, we may remark, in the language of Mr. Justice Harlan, delivering the opinion of the court in the recent *Lottery Case*, 188 U. S. at pp. 362–363:

> "The power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several States."

Nor, as to foreign commerce, is there any need to challenge or doubt the unlimited power of Congress to exclude or prohibit, and, as a means to that end, to lay prohibitive duties. Its authority to do so does not rest upon the taxing power, for even if the national government had no power to tax, its power

to regulate foreign commerce and international relations would be broad enough to support prohibitory duties on imports. No one has ever doubted that a governmental power to regulate international trade included the power to tax it as a means of regulation. The American colonies did not deny the authority of the British Parliament to tax them *as a regulation of commerce.* The War of the Revolution was precipitated because Parliament sought to use this power for another object, namely, the raising of revenue as such.[1]

It may, therefore, be conceded that Congress, under the plenary power to regulate our relations with foreign countries, can exclude commodities of any nature whatsoever, and levy prohibitive taxes or protective duties to accomplish that object. The power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities in its judgment and discretion need not be challenged in the slightest degree. But no one would seriously suggest that any class of American citizens could be excluded or deported under the same power which enables Congress to exclude or deport aliens. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653. When we say that Congress may exclude or deport foreigners or their products or publications from the United States, or pass a non-intercourse law, or place an embargo upon foreign ships or manufactures, we are but recognizing the ancient doctrine of international law that an alien and an alien's property come into the territory of a sovereign nation only by its sufferance, and may be

[1] *Gibbons* v. *Ogden*, 9 Wheat. 1, 199, 202.

excluded at its will.[1] And whether the exclusion be for the purpose of self-defense, or as an incident to the regulation of imports or commerce, or otherwise, the right to exclude or deport or prohibit is as much the sovereign's prerogative as the power to make treaties giving to foreigners the privilege of abiding or of bringing or selling their goods or publications within the sovereign's domain. That this attribute of sovereignty has been surrendered by and does not belong to the States cannot for a moment be doubted, for the States are expressly forbidden to enter into any form of treaty.[2]

In Cooley on Taxation, the distinguished author well says (at pp. 11, 12, 13):

> "In the laying of taxes, one purpose had in view may be to encourage one branch of industry or trade, though at the expense of others; as where a tax is laid upon certain fabrics received from abroad by the exchanges of commerce for the sake of encouraging the domestic producer of similar articles, on whose industry the tax operates as a bounty. Such a burden, however, may be so heavy that the market will not warrant its being paid, and in such case, instead of producing revenue, it merely precludes importation. But a law which, under the name of taxation, has for its purpose only to embarrass and, perhaps, to destroy a certain branch of commerce, if enacted by a State, would look to the general police power for its justification; and, if enacted by the general government, would seem more properly to derive its force from the authority conferred upon the government to regulate commerce,

[1] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, 712; *United States* v. *Brigantine "William,"* 2 Hall's Am. Law Journal, 255; *Gibbons* v. *Ogden*, 9 Wheaton, 1, 191, 192.

[2] Section 10 of Article I of the Constitution of the United States.

and the intercourse with foreign countries, than to an authority conferred for revenue purposes, which such a law would not aim or tend to subserve. . . . As no one will pay the tax who does not expect to be reimbursed the expense from the profits of sales, it is obvious that the heavier the tax the fewer can afford to pay it, and it may be made so heavy that no one can afford to pay it, and then it becomes prohibitory. A tax laid for the double purpose of regulation and revenue must be grounded in both the police and the taxing power; *but the grant of a power to tax would not authorize the imposition of a burden in its nature and purpose prohibitory.*"

II.

THE INTERNAL COMMERCE OF THE STATES AND THE EXERCISE OF THE TAXING POWER BY CONGRESS.

In the cases at bar, the court is called upon to consider what purports on its face to be a tax law, but which, it is contended, constitutes the imposition of a burden in its nature and purpose prohibitory of the internal commerce of the States in a recognized article of commerce.[1]

There can be no reasonable doubt that any statute of Congress which purported on its face to prohibit internal commerce in oleomargarine would be declared by this court to be unconstitutional and void on the ground that it sought to accomplish an object not entrusted to Congress and invaded the powers reserved to the States.[2] It is now to be determined whether Congress may nevertheless accomplish this forbidden object and thereby under the form of a tax law, do indirectly what it could not do directly.

[1] *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 8.
[2] *United States* v. *Dewitt*, 9 Wall. 41, 43–45; *Trade-Mark Cases*, 100 U. S. 82, 96; *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 11–13.

If the object of the act be legitimate taxation, the excise in question is concededly within the constitutional powers of Congress; but if, under the pretext of laying an excise on manufactures, the object sought to be accomplished is to prohibit or destroy the manufactures and internal commerce of the States, then it is submitted that the legislation is not legitimate taxation at all and is beyond the authority delegated to Congress and conflicts with the powers expressly reserved to the States.

Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, 423, among other things said:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. . . . Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

The settled doctrine of this court is that whatever may be the motive or pretext or guise of a statute, or in whatever language it may have been framed, its purpose and its validity must be determined by its natural and reasonable effect to be ascertained from the practical operation of its provisions.

Thus, in *Henderson* v. *Mayor of New York*, 92 U. S. 259, 268, Mr. Justice Miller, delivering the unanimous opinion of the court, among other things, said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger cases*. To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum."

Mr. Justice Miller in *Morgan* v. *Louisiana*, 118 U. S. 455, 462, again referred to this point in the following language:

> "In all cases of this kind it has been repeatedly held that, when the question is raised whether the State statute is a just exercise of State power or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose. See *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Chy Lung* v. *Freeman*, 92 U. S. 275; *Cannon* v. *New Orleans*, 20 Wall. 577."

In construing a state statute applicable to oleomargarine, Mr. Justice Peckham in *Collins* v. *New Hampshire*, 171 U. S. 30, 33, 34, speaking for the court, said:

> "The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U. S. 259; *Morgan's Steamship Co.* v.

Louisiana, 118 U. S. 455, at 462. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

Indeed, as Mr. Justice Harlan said, in *Mugler* v. *Kansas*, 123 U. S. 623, 661:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

And Mr. Justice Brewer in *Fairbank* v. *United States*, 181 U. S. 283, 294, 295, 300, speaking of the decision in *Woodruff* v. *Parham*, 8 Wall. 123, used the following language:

> "In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restrictions cannot be accomplished indirectly by legislation which accomplishes the same result. . . . The form in which the burden is imposed cannot vary the substance. . . . Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation."

In *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698, Mr. Chief Justice Fuller said, speaking of taxation:

> "The substance and not the shadow determines the validity of the exercise of the power."

And again in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 581:

> " If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution. . . . But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

In *Thomas* v. *Gay*, 169 U. S. 264, 283, Mr. Justice Shiras, speaking of the acts of a territorial legislature under authority of Congress, said :

> " When, as may sometimes happen, the legislature transcends its functions and enacts, in the guise of a tax law, a law whereby the property of the citizen is confiscated, or taken for private purposes, the judiciary has the right and duty to interpose."

Mr. Justice McKenna, in *Smith* v. *St. Louis and Southwestern Ry. Co.*, 181 U. S. 248, 257, said:

> "Any pretense or masquerade will be disregarded, and the true purpose of a statute ascertained."

It must, therefore, be presumed that the purpose which Congress had in view in the statute of 1902 was to accomplish that which follows as the natural and reasonable effect of its enactment, and that if the tax now in question operates as a prohibition of the manufacture and sale of an article of commerce, the legislation is an invasion of the powers reserved to the States, and seeks to accomplish an object beyond the powers granted to Congress.

It is not, of course, disputed that Congress for national purposes may tax the manufactures of a State whether constituting internal or interstate

commerce, and that both the national and state governments can lay excise taxes upon the same articles. Conflict may thus arise; and as commodities can only bear a certain amount of taxation, varying according to the nature of the article, the exercise of the taxing power by one government may indirectly affect the collection of taxes by the other. The mere fact that Congress taxed a given article, *e. g.*, liquors, would not, of course, limit or affect the power of the States either to tax or to prohibit its manufacture so far as concerned internal commerce; [1] and conversely the fact that a State taxed its manufactures would not limit or affect the power of Congress to tax the same commodities. In the case at bar, there is, however, no conflict of taxing powers, for neither the State of Illinois nor the State of Ohio taxes the manufacture of oleomargarine other than indirectly by means of general property taxes.

In its final analysis, then, the court is asked to determine the validity of the present law according to its natural and reasonable effect which "amounts in law to a prohibition"; in other words, to determine by its practical operation whether it is a tax law at all, or merely an attempt to prohibit internal commerce under the guise or pretext of a tax law. There is no rule of constitutional law and no consideration of public policy which will prevent this court from deciding according to substance and not to form, simply because a given enactment purports to be an exercise of the taxing power. The indisputable law of the Constitution is

[1] *License Tax Cases*, 5 Wall. 462, 470; *Pervear* v. *The Commonwealth*, 5 Wall. 475, 479.

that Congress may not interfere with or regulate the internal commerce or affairs of a State, and the court will enforce that rule according to its letter and its spirit. The Tenth Amendment imperatively forbids any such interfering regulation as much as if the Constitution declared in so many words that Congress should not interfere with internal commerce. It surely cannot be maintained as a rule of our constitutional law that what Congress may not do directly it may nevertheless do indirectly under the pretext of an exercise of the taxing power. As Mr. Chief Justice Fuller said in the *Income Tax cases, supra* (157 U. S. 429, 581):

> "It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

But, it will be said, the concession of the power to tax brings the case within the rule that the extent of the exercise of the taxing power cannot be controlled by the courts. This argument, however, begs the whole question. The point to be decided is whether or not this is a tax law or a regulation of the internal commerce of the States. If it be a legitimate tax law, it is constitutional. If the nominal exercise of the taxing power be a mere pretext "for the accomplishment of objects not entrusted to the government," then it is not constitutional, and it is the province of this court to so declare. It may be often difficult to draw a line between a tax law and an attempt to regulate or prohibit under the guise or pretext of a tax; but yet it is not always impracticable, for the validity of many enactments, state and national, may depend upon degree. The amount of a tax or license fee or regulation of rates

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frequently forms the basis of judicial action and determines the validity of legislation. The court has found no insuperable difficulty in determining the difference between a tax and a reasonable fee covering expenses to protect the government against fraud,[1] between a tax on exports and a mere stamp duty on a document,[2] between a tax and a penalty,[3] between a tax and a covert regulation of interstate commerce,[4] between a legitimate regulation of rates and a regulation which is confiscatory.[5] The amount of the tax imposed in a given case has often been considered by this court in determining whether a particular statute was valid as a means to accomplish a constitutional object, or invalid as a pretext to accomplish an object forbidden by the Constitution. The instance of a license tax upon persons or corporations engaged in foreign or interstate commerce is a common one. In such a case, the only object which may constitutionally be accomplished by a State is compensation for reasonable governmental inspection or supervision. If the amount of the tax be materially in excess of what is necessary for that object, there is an indication of a purpose to regulate foreign or interstate commerce; and it is therefore necessary for the court to draw the line in each case according to the amount and adjudge what amount will constitute taxation for a proper purpose and what amount will constitute a regulation of commerce. *Atlantic, etc., Tel. Co.* v. *Philadelphia*,

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[1] *Pace* v. *Burgess, Collector*, 92 U. S. 372, 374, 375.
[2] *Fairbank* v. *United States*, 181 U. S. 283, 290.
[3] *Helwig* v. *United States*, 188 U. S. 605, 611.
[4] *Atlantic, etc., Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 162.
[5] *Smyth* v. *Ames*, 169 U. S. 466, 527.

190 U. S. 160, 164. While a State may impose a license fee upon foreign corporations engaged in interstate commerce and indirectly tax their franchises,[1] it cannot for a moment be doubted that, if the State should impose a prohibitory tax, it would be unconstitutional and that the question of constitutionality in such a case would depend entirely upon degree. If, for example, a State should impose a property tax upon an express company,[2] the effect of which was practical prohibition, no doubt the court would hold that it was not a legitimate tax at all, but a roundabout way of prohibiting indirectly what the State could not prohibit directly, namely, interstate commerce. So, whenever it is claimed that the amount of a state inspection charge upon articles of foreign or interstate commerce is so much in excess of what is reasonably necessary to accomplish that object as to evince a purpose to interfere by taxation with foreign or interstate commerce, the court must decide when the amount in the particular case becomes unconstitutional. *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 351 *et seq.*, citing cases. The same principle applies in those cases where the amount of compensation for the use of property affected by a public interest is drawn in question as being confiscation in the guise of police regulation. *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S.

[1] *Maine* v. *Grand Trunk R'y Co.*, 142 U. S. 217, 228; *Ficklen* v. *Shelby County*, 145 U. S. 1, 23; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697; *Atlantic, etc., Tel. Co.* v. *Philadelphia*, 190 U. S. 160, 163, citing cases.

[2] *Adams Express Company* v. *Ohio*, 165 U. S. 194, 220; *Adams Express Company* v. *Kentucky*, 166 U. S. 171, 180: *Adams Express Company* v. *Ohio*, 166 U. S. 185, 221.

238, 250, and *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 85, citing cases.

At the last term, in *Helwig* v. *United States*, 188 U. S. 605, 611, Mr. Justice Peckham said:

> "Whether called a 'further sum' or an 'additional duty,' or by some other name, the amount imposed was so large in proportion to the value of the merchandise imported as to show beyond doubt that it was a sum imposed not in fact, as a duty upon an imported article, but as a penalty and nothing else."

So, with regard to the tax in question, the amount of the tax is so large in proportion to the value of the merchandise as to show beyond doubt that it was a sum imposed, not in fact as an excise for revenue, but as a prohibition, and nothing else.

Let us take, for the purpose of concrete illustration, the case of oleomargarine. It has been held that a State, under the power to regulate its internal commerce, could prohibit the manufacture and sale of oleomargarine (*Powell* v. *Pennsylvania*, 127 U. S. 678, 686; *Plumley* v. *Massachusetts*, 155 U. S. 461, 467, and *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246), but that it could not prohibit the sale of oleomargarine manufactured in other States and offered for sale in the course of interstate commerce. *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 21, 25. Is it conceivable that nevertheless, a State, could indirectly do what this court has said it could not directly do, that is, practically prohibit interstate commerce in oleomargarine by taxing it to death? Surely this court would not entertain an argument attempting to uphold such legislation upon the ground that on

its face it was impartial and applied alike to internal and interstate commerce and that the power to tax involved the power to destroy.[1]

If a State should impose a tax upon a commercial commodity as *property*[2] and the effect of such a tax, as to articles brought from other States, was to destroy all opportunity to sell the commodity, it cannot be doubted that the law would be declared unconstitutional as interfering with interstate commerce even though the same amount of tax should be laid on domestic manufactures as property, and even though such a tax would only apply after the 'original package' of importation had been broken and the contents exposed for sale.[3] There would be *prima facie* no discrimination in the law; on its face it would apply impartially to home and foreign manufactures alike. Nevertheless, such a tax law would be held unconstitutional; for, if allowed to operate, it could as effectually bar the products and manufactures of other States as if the law directly enacted that such articles should not be sold.[4] The products of one or more States could thus, by taxation, be excluded from any State. Fortunately, "such efforts have been heretofore rendered fruitless by the supervis-

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[1] *Woodruff* v. *Parham*, 8 Wall. 123, 131, 140; *Brown* v. *Houston*, 114 U. S. 622, 634. Of course, where the State may prohibit as a police regulation, different considerations are presented, as discussed by Judge Cooley in the quotation from his work on Taxation, *supra*, pp. 27, 28.

[2] *Woodruff* v. *Parham*, 8 Wall. 123, 131, 140; *Hinson* v. *Lott*, 8 Wall. 148, 152; *Brown* v. *Houston*, 114 U. S. 622, 632, 634; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 74; *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445, 453.

[3] *May* v. *New Orleans*, 178 U. S. 496, 508.

[4] *Leloup* v. *Port of Mobile*, 127 U. S. 640, 647; *Brennan* v. *Titusville*, 153 U. S. 289, 303.

ing action of this court."[1] In the supposed case, it would undoubtedly be held that, in whatever language the statute was framed, its purpose must be determined by its natural and reasonable effect. The court would brush aside the form and the pretext, and hold that the tax in its practical effect was prohibitory, that the purpose of the legislation was legally to be determined by such prohibitory effect, and that prohibition was beyond the constitutional power of a State.[2]

In the case of such a property tax levied by a State, would it not be relevant to show that the amount of the tax was such as to prevent sales, and that consequently it was not strictly a tax law at all but a regulation of interstate commerce? It would undoubtedly be held that in whatever language the statute was framed, its purpose must be determined by its natural and reasonable effect.

On the other hand, if the tax was not prohibitive but a proportional and reasonable charge for the maintenance of the state government, levied upon all similar *property*, entirely different considerations would be presented, and it would then be for the courts to determine whether such a law was in its purpose, operation or effect a proper and reasonable tax law which did not unduly interfere with the power of Congress to regulate interstate commerce.[3] In such a case, too, would it not be relevant to show that the amount of the tax was such as not to operate as a practical prohibition of

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[1] *Caldwell* v. *North Carolina*, 187 U. S. 622, 633.

[2] *American Fert. Co.* v. *Board of Agriculture, No. Car.*, 43 Fed. Rep. 609, 613, cited in *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345, 347.

[3] *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 697.

sales in competition with the products of the taxing State? Or, if it were in the guise of an inspection or license fee, would it not be relevant to show that it was not large enough to operate as a prohibition or penalty?[1]

Are not these all cases of degree and does not the extent and effect of the tax determine its constitutionality?

Nor does the fact that the act of Congress applies also to interstate commerce affect the question, for it is the settled law of this court that the power of Congress to regulate interstate commerce does not uphold any act which operates directly upon internal commerce and invades the domain of the States. The very point was involved in the *Trade-Mark Cases*, 100 U. S. 82, 95, 96, where, delivering the unanimous opinion of the court, Mr. Justice Miller said:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

The principal argument in support of the law has heretofore been based upon the famous phrase "that the power to tax involves the power to destroy," in

[1] *Ward* v. *Maryland*, 12 Wall. 418, 425, 429; *Welton* v. *State of Missouri*, 91 U. S. 275, 278; *People* v. *Compagnie Gen. Transatlantique*, 107 U. S. 59, 60; *Moran* v. *New Orleans*, 112 U. S. 69, 73; *Walling* v. *Michigan*, 116 U. S. 446, 461; *Emert* v. *Missouri*, 156 U. S. 296, 311.

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support of which is cited the decision of this court in *Veazie Bank* v. *Fenno*, 8 Wall. 533.

We know of no dictum in any decision that has been more misconstrued than the statement of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 431, that "the power to tax involves the power to destroy," nor of one whose misapplication is more illustrative of the dangers which lurk in a brilliant epigram. Since that decision, there has been no arbitrary or unjust exaction under the guise or pretext of taxation but that it is said to be sanctioned by this dictum. It has done immeasurable harm, for it has been held up before legislatures as placing in their hands unrestrained power to exercise tyranny in the form of law. "How oft the sight of means to do ill deeds makes ill deeds done."[1] The great Chief Justice never meant to say that the taxing power could be arbitrarily exercised to the extent to which his language has been perverted, or that it could be used as a pretext to accomplish a forbidden object. He would have repudiated such a proposition as monstrous and against all justice and reason. Far from meaning to say that the power of taxation could be used as a mere pretext for accomplishing objects not entrusted to the government, at page 423 of the same opinion, he distinctly pointed out that Congress could not do so. He never meant that under the power of taxation, either of the federal or the state governments, any class of persons or business could properly be selected for destruction. He was speaking of a discriminating state

[1] King John, IV, 2. See "The Oleomargarine Bill" (Gov. Print, 1901), p. 857.

tax imposed upon an instrumentality of the national government. He did not mean that, under the pretense of taxation, Congress could invade any State and destroy one of its industries solely for the purpose of benefitting another competing industry. He was speaking of a legitimate tax law. Had the occasion arisen in his time, who can doubt that he would have limited this now famous dictum to the facts of that case? *Cohens* v. *Virginia*, 6 Wheat. 264, 399. Doubtless he would have held that the Constitution will not admit of the exertion of any power of government, be it the taxing power or any other, which, in its last analysis, is appropriate and calculated only to interfere with the internal concerns of the States and to accomplish the destruction of private property and the deprivation of the right to pursue a useful calling without due process of law.

Even though it be true, in a proper sense, that the power to tax involves the power to destroy, it is no less true, by the reasoning of the opinion in *McCulloch* v. *Maryland* (at p. 423), that this power to destroy, in the hands of Congress, must not be exerted to accomplish objects not assigned to it by the Constitution. It must operate in harmony with the constitutional scheme. On the other hand, this same power to destroy in the hands of a State (which is the sense in which it was discussed by Marshall) is justifiable by the inherent power of government originally and always residing in the States, provided only it be not forbidden by the Constitution. In short, though the destruction of the oleomargarine industry by a repressive state tax might be supported under the police power by all those

familiar arguments which have been advanced in this court during the past sixteen years,[1] a similar repressive tax by Congress must be supported, if at all, on other grounds. Cooley on Taxation, p. 12, 13.

The suggestion in *McCulloch* v. *Maryland*, 4 Wheat. 316, 435, that Congress might tax a state instrumentality with more reason than a State could tax an instrumentality of the Nation, cannot be cited as sustaining an unlimited taxing power in Congress, inasmuch as it has long since been established that Congress has no power to tax the instrumentalities of a State (*Snyder* v. *Bettman*, 190 U. S. 249, 253), unless it be necessary and proper to carry into execution some power given to Congress other than the power of taxation.

In *Berney* v. *Tax Collector*, 2 Bailey (S. C.) 654, 674, Harper, J., said, in speaking of a state tax upon stock of the United States Bank, and after discussing Marshall's dictum that the power to tax involves the power to destroy:

> "It will be perceived, that in my opinion the question is, whether the imposition in question is, *in good faith*, *a tax*, or whether, under the guise of a tax, a *penalty* was intended to be inflicted, with a view to the suppression of the bank. Such a distinction was made in the case of *The State* v. *Allen*, 2 M'C. 55, where a tax, as it was called, of $10,000, was imposed on the act of selling lottery tickets. And this court held, that, although called a tax, it was in fact a penalty, having no reference to property; and that it violated the provision of our constitution, that 'no freeman of this State shall be taken, or imprisoned, or disseized of his

[1] *Powell* v. *Pennsylvania*, 127 U. S. 678; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238.

freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or the law of the land.'

I am aware, that it has been objected to this method of construction, that it is liable to too great uncertainty, and gives to the courts a dangerous latitude of construction, in determining on the *intention* of the legislature. When will you say that the law becomes unconstitutional? When the tax is raised to five, or ten, or fifty per cent.? By what rule shall government be conducted? Or when can the legislature be assured that its laws will have effect? In general, perhaps, it is desirable, that rules of law should be technical and artificial; being thus susceptible of greater precision: but this is not always practicable, and I fear that we may sometimes run into the most dangerous errors, in searching after this precise, technical, artificial rule. In such a case as this, it is not possible to have one, unless, by adopting such artificial reasoning as I have referred to in the beginning, we pervert the constitution to purposes, for which it, most notoriously, was never intended, and change the whole character of our institutions."

The *Veazie Bank* case is not authority for an unlimited and arbitrary power to tax. On the contrary Chief Justice Chase said (p. 541) that—

> "There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government of the States, *or if exercised for ends inconsistent with the limited grants of power in the Constitution.*"

The tax in that case was sustained upon the ground that Congress, in the exercise of undisputed authority to regulate the currency, could adopt any means suitable for that purpose, and that a prohibitive tax con-

stituted an appropriate means.[1] If the statute had declared on its face that it was intended to prohibit issues of currency by state banks, the act would have been constitutional. The *end* was legitimate and prohibitory *means* were appropriate. If there had been no power in Congress to regulate the currency, it cannot be doubted that the tax then imposed would have been regarded as seeking to accomplish an object not entrusted to Congress and "exercised for ends inconsistent with the limited grants of power" to the federal government and the powers expressly reserved to the States.

That the *Veazie Bank* decision does not rest upon the proposition that the power to tax involves the power to destroy the currency of state banks has been repeatedly recognized by this court.

Thus, at the same term, Mr. Justice Miller, who concurred in the opinion of the court in the *Veazie Bank* case, said in his dissenting opinion in *Hepburn* v. *Griswold*, 8 Wall. 603, 636:

> "In the *Veazie Bank* v. *Fenno*, decided at the present term, this court held, after full consideration, that it was the privilege of Congress to furnish to the country the currency to be used by it in the transaction of business, whether this was done by means of coin, of the notes of the United States, or of banks created by Congress. And that as a means of making this power of Congress efficient, that body could make this currency exclusive by taxing out of existence any currency authorized by the States."

The precise question decided in the *Veazie Bank* case arose again ten years later in *National Bank* v. *United*

[1] See, however, the language used at p. 548.

States, 101 U. S. 1, and the language employed in deciding it shows clearly the scope of the principle involved. Chief Justice Waite, delivering the opinion of the court, said (pp. 5, 6):

> "We think this case comes directly within the principles settled in *Veazie Bank* v. *Fenno*, (8 Wall. 533), where it was distinctly held that the tax imposed by that section on national and State banks for paying out the notes of individuals or State banks used for circulation was not unconstitutional. The reason is thus stated by Mr. Chief Justice Chase: 'Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.' . . . The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a State municipality has no right to put its notes in circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. *The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do.*"

The true scope of the principle of the *Veazie Bank* case is perhaps most clearly apparent from its application in the *Head Money Cases*, 112 U. S. 580, 596, decided in 1884. It is there held that an otherwise unconstitutional exercise of the taxing power may be upheld where the object accomplished is one committed to Congress by the Constitution; and the *Veazie Bank* case is relied on as the leading authority. Mr. Justice Miller, who delivered the opinion of the court, said:

> "If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549, the enormous tax of eight [ten] per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal-tender notes and the notes of the national banks. *It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple.* . . . We are clearly of opinion that, in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for Congress to impose this contribution on the ship owner engaged in that business."

The *ratio decidendi* of the cases upon this point is summed up by Mr. Justice Miller in *Loan Association* v. *Topeka*, 20 Wall. 655, 663, namely,—

> "Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited."

And the tax involved in that case was condemned because the object of the statute was found to be the

encouragement and benefit of certain private industries. To the same effect, see *Parkersburg* v. *Brown*, 106 U. S. 487, 500; *Cole* v. *LaGrange*, 113 U. S. 1, 6; *The State ex rel.* v. *Osawkee Township*, 14 Kan. 418, 427; *Lowell* v. *Boston*, 111 Mass. 454, 461; *Mead* v. *Acton*, 139 Mass. 341, 344; *Allen* v. *Inhabitants of Jay*, 60 Me. 124, 128, 138; *Sugar Co.* v. *Auditor General*, 124 Mich. 674, 678; *State* v. *Foley*, 30 Minn. 350, 357; *Weismer* v. *Village of Douglas*, 64 N. Y. 91, 100; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 515; *Sharpless* v. *Mayor of Philadelphia*, 21 Pa. St. 147, 168; Burroughs on Taxation, pp. 6, 506.

Answering the argument that the power to tax involves the power to destroy, Mr. Justice Harlan, delivering the dissenting opinion in *Fairbank* v. *United States*, 181 U. S. 283, 318, used the following language:

> "It is said that the power to tax is the power to destroy, and that if Congress can impose a stamp tax of ten cents upon the vellum, parchment or paper on which is written a bill of lading for articles to be exported from a state, it could as well impose a duty of five thousand dollars and thereby indirectly tax the articles intended for export. That conclusion would by no means follow. A *stamp* duty has now, and has had for centuries, a well defined meaning. It has always been distinguished from an ordinary tax measured by the value or kind of property taxed. If Congress, in respect of a bill of lading for articles to be exported, had imposed a tax of five thousand dollars for and in respect of the vellum, parchment or paper upon which such bill was written, the courts, looking beyond form and considering substance, might well have held that such an act was contrary to the settled theory of stamp tax laws, and that the purpose and necessary operation of such legislation was, in

violation of the Constitution, to tax the articles specified in such bill and not to impose simply a stamp duty. Here, the small duty imposed, without reference to the kind, quantity or value of the articles exported, renders it certain that when Congress imposed such duty specifically on the vellum, parchment or paper upon which the bill of lading was written or printed, it meant what it so plainly said; and no ground exists to impute a purpose by indirection to tax the articles exported."

If, therefore, "the courts, looking beyond form and considering substance" in the cases at bar, shall be persuaded that the purpose and necessary operation of this legislation be to accomplish an end or object not entrusted to this government, the legislation may and should be declared unconstitutional. *McCulloch* v. *Maryland*, 4 Wheat. 316, 423. In other words, given a case in which Congress has authority to prohibit, as in the case of foreign commerce or the currency, and it may accomplish that object by prohibitory taxation. If, however, Congress has not the power to prohibit as a legitimate end or object, it may not do so indirectly under the pretext of exercising the taxing power.

It may be argued that the prohibition of yellow oleomargarine is necessary and proper to facilitate the collection of the tax on other oleomargarine, and to prevent fraud in sales of articles taxed by the government; but the argument that the prohibitive tax of ten cents per pound was laid to facilitate the collection of the tax of one-quarter of one cent on other colors of oleomargarine cannot uphold the law. Such a purpose is too remote and uncertain. In *United States* v. *Dewitt*, 9 Wall. 41, 44, the question was as to the validity of section 29 of the Internal Revenue Act of

March 2, 1867 (14 Stat. 484), which made it a misdemeanor to mix for sale or to sell or offer for sale naphtha and illuminating oils, inflammable at less than a designated temperature. It was held that the act could have no constitutional operation within state limits because it was a mere police regulation relating exclusively to internal trade of the States. Chief Justice Chase, delivering the opinion of the court and referring to the want of jurisdiction in Congress to interfere with the internal commerce of the States, said (p. 45):

> "This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

It was, however, urged in that case on behalf of the government that the prohibition of the sale of illuminating oil, inflammable at less than a certain temperature, was in aid and support of the internal revenue tax imposed on other illuminating oils. In answer to this suggestion, Chief Justice Chase, among other things, said (p. 44):

> "If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described. This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes."

A further conclusive answer to this contention is that there is no demand for uncolored oleomargarine, except as a substitute for lard, and as such, a true construction

of the act does not permit any tax to be laid upon it. The act taxes oleomargarine under one of two express conditions and not otherwise, that is when "made in imitation or semblance of butter," or, "when so made, calculated or intended to be sold as butter or for butter" (Section 2). It is plain that oleomargarine manufactured in the usual way is not in imitation or semblance of butter, unless it is colored yellow, because it is pure white, or almost pure white, in appearance, whilst practically all butter which goes on the market is uniformly colored a high shade of yellow throughout the year. It is no less plain that oleomargarine so made is not calculated or intended to be sold as or for butter, and not even as a substitute for butter, because it can be sold only as a substitute for lard. A product which does not look like butter, and which can be sold only as a substitute for lard, is not oleomargarine within the definition of the act for the purpose of taxation. This is the construction placed on the act by Attorney-General Garland in his letter of October 18, 1886, to the Secretary of the Treasury (18 Op. Atty.-Gen. 489). This opinion was accepted as final and has ever since been acted on by the Treasury Department (Oleomargarine regulations, June, 1902, p. 12); and the Commissioner of Internal Revenue has specifically decided, under the authority vested in him by section 14 of the act, that oleomargarine designed only as a substitute for lard is not subject to any tax, although it has a shade of yellow color (Treasury Decisions, Vol. 6, No. 3, p. 36).

III.

THE RESTRICTIONS UPON THE TAXING POWER CONTAINED IN THE FIFTH AMENDMENT.

As we have already seen, the first ten amendments to the Constitution of the United States were adopted as limitations upon the powers delegated to Congress "in order to prevent misconstruction or abuse of its powers" by means of "declaratory and restrictive clauses." It has never been determined whether the provisions of the Fifth Amendment prevent the abuse of the taxing power by means of arbitrary and discriminating taxes, the effect of which would be to deprive an individual or a selected class of liberty and property without due process of law.

So far as is disclosed by a careful perusal of the debates in the constitutional conventions at the time the Constitution was ratified, as well as of the debates in Congress when the first ten amendments were proposed, it does not appear that the provision requiring 'due process of law' contained in the Fifth Amendment was mentioned as protecting the individual against arbitrary or discriminating taxation. The import of the words may or may not have been assumed to apply to taxation as well as to all other powers in the exercise or abuse of which the rights of the individual might come in conflict with the powers of government. The same thing may also be said of the circumstances surrounding the adoption of the Fourteenth Amendment shortly after the close of the Civil War, and yet it is established beyond question that the requirement of 'due process of law' in the

later amendment clearly applies to the taxing power of the States.

There is, however, no principle of constitutional construction which would permit the court to say that because the question of arbitrary or discriminating taxes was not in the minds of those who framed and adopted these amendments, "in order to prevent misconstruction or abuse of its powers" by the national government, the Fifth Amendment should not be applied to an abuse of the taxing power as well as of any other power. The taxing power was the most important and far-reaching of the powers conferred; it was the one the absence of which above all others had rendered the government under the Articles of Confederation impotent and imbecil; it was the one most liable to abuse; it was the one around and about which waged the contest for ratification of the Constitution, and it was the one which of all powers could obviously "as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."[1]

But even if it could be shown that the abuse of the taxing power was not in the minds of the people at the time these amendments were adopted and that the framers perceived and apprehended no danger from the abuse of that power, this fact would not tend to limit the scope of the amendments if the case now presented be fairly within their spirit and letter. As was said by Chief Justice Marshall in the famous

[1] *Loan Association* v. *Topeka*, 20 Wall. 655, 664.

case of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 644:

> "It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the constitution in making it an exception.
>
> On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there in the nature and reason of the case itself, that which would sustain a construction of the constitution not warranted by its words? Are contracts of this description of a character to excite so little interest, that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously

demand their remaining exposed to legislative alteration, as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed, as to exclude it?"[1]

Applying to the federal taxing power the doctrine thus lucidly stated, we may say that there is no reasonable ground which would justify the conclusion that if the abuse of the taxing power, by means of arbitrary, unequal and discriminating tax laws, had been in the minds of the framers of the Fifth Amendment, they would have varied its language so as to make it broader and more comprehensive. No one will seriously advance the proposition that public policy or the safety or perpetuity of the national government demand that Congress should have the power to impose arbitrary or prohibitive taxes upon internal industries. It would be repugnant to the very theory upon which these 'restrictive clauses' were drafted, and in conflict with the purpose sought to be accomplished by them, to now hold that there is in them no efficacy to restrict the most important power granted to Congress by the Constitution, the one most liable to abuse, and the one which at all times would most reach and affect the individual.

Indeed, it may be respectfully submitted that if it be now held that the requirement of 'due process of law' in the Constitution of the United States imposes no prohibition or limitation upon the taxing power of Congress, then the result must be that this amendment, in-

[1] See also *Slaughter-House Cases*, 16 Wall. 36, 72; *Ex parte Virginia*, 100 U. S. 339, 347, 361; *Holden* v. *Hardy*, 169 U. S. 366, 382, 385; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 676.

tended to constitute part of a bill of rights protecting the people in their individual liberties as against the majority wielding the power of government, must now be construed as if it read :

> "No person shall be . . . deprived of life, liberty or property, without due process of law, *except it be in the form of taxation;* nor shall private property be taken for public use, without just compensation, *except in cases of taxation.*"[1]

But, aside from these considerations, it is confidently submitted that had the first Congress deliberated at length upon the choice of a provision which would be most effective to prevent an abuse of the taxing power, it would have been difficult to select one more appropriate than that of 'due process of law,' or language which it was more natural for the descendants of Englishmen to have selected for that purpose. It embodied then, as now, one of those maxims of constitutional law "which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts bill of rights, the government of the commonwealth 'may be a government of laws and not of men.'"[2]

The phrase 'due process of law' or its equivalent 'the law of the land' antedated the establishment of our political institutions, and was endeared to our fathers by antiquity and tradition, as well as by the noblest historical associations. It represented the broadest and most far-reaching guaranty of personal

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[1] *County of Santa Clara* v. *Southern Pac. R. Co.*, 18 Fed. Rep. 385, 399; affirmed 118 U. S. 394, 417, 422.

[2] *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370.

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and property rights. There are no words in our language which signify or mean more in respect of the rights and liberties of the individual than either of these phrases. It is not deemed necessary, however interesting it would be, to trace the historical origin of the term 'due process of law' and the development of its meaning and scope, except to say that its first appearance in any of the great constitutional documents was probably in the Petition of Right in the third year of the reign of Charles I, and that it has ever since been regarded as having and importing exactly the same meaning as the words 'the law of the land' in Magna Charta.[1]

No statement of the general meaning of these equivalent phrases is more often quoted than that from Mr. Webster's argument in the famous *Dartmouth College case* (4 Wheat. at p. 581), viz.:

> "The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land."

The statement of Mr. Justice Story, in his work on the Constitution (5th edition, section 1945), is perhaps the most accurate, viz.:

> "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."

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[1] *Hurtado* v. *California*, 110 U. S. 516, 521, 527, 543.

Judge Cooley, in his Constitutional Limitations, in speaking of this phrase, uses the following language (Sixth ed., p. 433):

> "While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land."

The first exposition of these phrases by this court will be found in the case of *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 244, where Mr. Justice Johnson, among other things, said:

> "As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that *they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.*"

This statement as to the meaning and scope of the famous phrase has been repeatedly quoted with approval by this court, as will be seen by reference to the following cases: *United States* v. *Cruikshank*, 92 U. S. 542, 554; *Hurtado* v. *California*, 110 U. S. 516, 527; *Caldwell* v. *Texas*, 137 U. S. 692, 697; *Scott* v. *McNeal*, 154 U. S. 34, 45; *Taylor and Marshall* v. *Beckham*, 178 U. S. 548, 592.

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Mr. Chief Justice Fuller in *Giozza* v. *Tiernan*, 148 U. S. 657, 662, said, speaking for the court:

> "And *due process of law* within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

See also *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Thomas* v. *Gay*, 169 U. S. 264, 283; *Norwood* v. *Baker*, 172 U. S. 269, 279.

The court has never attempted to define the provision 'due process of law,' with precision and probably never will, any more than it would attempt to define the word 'justice' in the preamble to the Constitution; but nevertheless the phrase has constantly been recognized as embodying fundamental principles of right and justice which protect the individual from the arbitrary exercise of any power of government. As Mr. Justice Brown said in *Holden* v. *Hardy*, 169 U. S. 366, 389:

> "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

It is true that the cases in this court applying to taxation the constitutional guaranty of 'due process of law' arose under the Fourteenth Amendment and related to state laws; but, after the most careful study and reflection, no reason can be perceived why the very same provision in the Constitution should have one meaning when applied to the state governments and a narrower meaning and more limited scope when applied to the national government. *Sinking Fund*

Cases, 99 U. S. 700, 718. Logically, if there could be in reason and justice any difference, it should be against the national government, which is indisputably one of limited and enumerated powers. Cooley on Taxation, p. 12. The only sound principle must be that the provision is the same in both cases as applied to the taxing power (Mr. Justice Harlan dissenting in *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 355).

If it appeared that the State in a given case could not, under the police power, prohibit or destroy commerce in a particular commodity, and was simply exercising the taxing power, it is submitted that a tax upon a commodity, which amounted to practical confiscation or prohibition of its manufacture and sale, would clearly deprive the individual of property and liberty without due process of law within the meaning of the Fourteenth Amendment. In the *Powell* case as well as in the *Plumley* case it was recognized that a statute under the police power which prevented all sales in a legitimate article of commerce would not be valid. *Powell* v. *Pennsylvania*, 127 U. S. 678, 685; *Plumley* v. *Massachusetts*, 155 U. S. 461, 467.

Mr. Justice Harlan, in the opinion of the court in the *Lottery Case* (at p. 363) recognized that, in the exercise of the power to regulate commerce among the several States, Congress could not act arbitrarily, but was "subject to the limitations imposed by the Constitution upon the exercise of the powers granted," and there is no reason to suppose that the learned justice did not mean to refer particularly to the most comprehensive and far-reaching of all limitations embodied in the constitutional guaranty of 'due process of law.' In *Inter-*

state Commerce Comm. v. *Brimson*, 154 U. S. 447, 479, the learned justice also said: "It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guaranties." The very same reasoning must apply to the exercise of the taxing power.

Assuming, for the reasons above stated, that the restrictive clause of the Fifth Amendment applies to the exercise of the taxing power, then its prohibition or limitation should be enforced in its spirit and to its entirety as fully as if it were part of the very article conferring the taxing power. *Prout* v. *Starr*, 188 U. S. 537, 543. As Mr. Justice Brewer said in the case of *Fairbank* v. *United States*, 181 U. S. 283, 288:

> "We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help

found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

The act of Congress of May 9, 1902, purports to levy what is strictly and technically an excise upon the manufacture and sale of an article of food. *Patton* v. *Brady, Executrix*, 184 U. S. 608, 618. An *excise* is generally included in the term *tax* which, "in its most enlarged sense, embraces all the regular impositions made by government upon the person, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue. . . . Taxes are distinguished from arbitrary levies in that they are laid according to some rule which apportions the burden between the subjects thereof. An exaction which is made without regard to any rule of apportionment is therefore not a tax, and is not within the constitutional authority of the government."[1] Chief Justice Marshall defined 'taxation' to be "the simple operation of taking small proportions from a perpetually accumulating mass, susceptible of almost infinite division."[2] What would he have said of an alleged tax which took all?

There is undoubtedly a difference between a land or property tax and an excise upon a business or upon the manufacture and sale of a commodity. An excise may be upon the article, or its value, or its quality, or its quantity, or its weight; but however the amount be determined, whether by specific or *ad valorem* taxes or

[1] *Cooley's Pr. Const. Law*, Third ed., p. 56.
[2] *Gibbons* v. *Ogden*, 9 Wheat. 1, 199.

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duties, or both methods, although it need not be inherently equal, it must operate alike on all persons within the class selected or who exercise the same privilege.

The most satisfactory definition of an excise is to be found in the Massachusetts reports. It is true that the Massachusetts constitution requires excises to be 'reasonable,' but the following definition is not therefore without general application. A leading case is that of *Oliver* v. *Washington Mills*, 11 Allen, 268, 274, 279, where Bigelow, C. J., speaking for the Supreme Judicial Court, said:

> "An excise, on the other hand, is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid. . . . It only remains for us to consider whether the assessments laid on the defendants can be supported as a valid exercise of the power to impose excises. . . . In the first place, it is grossly unequal, and does not operate alike on all persons whose property is made subject to it. It was declared by this court in *Portland* v. *Apthorp*, *ubi supra*,[1] that 'Taxes of this sort must undoubtedly be equal'; that is, must operate alike on all persons who exercise a particular employment or enjoy the same privilege or commodity. The same doctrine was affirmed in the recent case of *Commonwealth* v. *People's Savings Bank*, *ubi supra*.[2] The reason is obvious. In the language of the court, an unequal excise would be 'contrary to the principles of justice.' That the excise in ques-

[1] 12 Mass. 252, 255.

[2] 5 Allen, 431.

> tion operates unequally in this sense cannot be doubted."

This definition of an excise was cited by the Attorney-General of the United States (Hon. Charles Devens) in the opinion furnished to Congress for its guidance (15 Op. Attys.-Gen., p. 219), adding that such an excise " may be increased or diminished by the extent to which the privilege is exercised."

Assuming that an excise must operate alike on all persons whose property or business selected for taxation is substantially the same in character, and that an arbitrary and discriminating excise would be 'contrary to the principles of justice' and would not constitute 'due process of law,' it remains to consider whether the excise now before the court is arbitrary and discriminating as contended by the plaintiffs in error.

The act of Congress purports to lay an excise tax upon oleomargarine. Congress, of course, knew, as its very definition discloses, that oleomargarine was a substitute for butter and that this quality and essence alone gave it commercial value or utility. The act imposes a tax of ten cents per pound upon yellow oleomargarine, which is shown to be prohibitive, and under the authorities above discussed such prohibitive operation must be presumed to have been the purpose of Congress. For all legitimate purposes of taxation, oleomargarine, whether colored or uncolored, is practically the same thing, and there are no inherent differences between them which would warrant their separation into two distinct classes. In the nature of things, reasoning solely according to the rules which should govern the imposition of taxes, white

oleomargarine ought not to be taxed one-quarter of a cent a pound and yellow oleomargarine forty times as much, and, in the absence of some ulterior motive, such discrimination would never have been attempted. No conceivable reason can be suggested for the discrimination based alone upon the yellow color, other than that it competes with another and *untaxed* article of commerce, namely, butter. On the very face of the act, it is declared that this discrimination of ..early four thousand per cent. in the amount of the tax imposed is made solely because oleomargarine in its commercial form looks like butter. Such legislation, it is submitted, is just as arbitrary and indefensible as if Congress were to endeavor to lay a capitation tax upon men of red hair, and it were to be argued in support of such a law that it was constitutional because apportioned.

It cannot be denied that the tax on yellow oleomargarine in the case at bar is an extraordinary piece of legislation, unusual in our system of government, and of a kind heretofore happily rare. On its face, it imposes an enormous and disproportional penalty upon the mere fact of coloring a wholesome and nutritious article of food, whilst another competing food product, practically the same substance produced in a different way, is left untaxed. The proof shows that in its practical operation the necessary effect of the discrimination is the destruction of an industry conducted within the jurisdiction of a State, by which the plaintiffs in error and thousands of others are deprived of a means of livelihood in a legitimate trade.

When we say that the federal tax on oleomar-

garine is arbitrary, we do not mean to say that Congress was actuated by no reason in making the discrimination. We concede that it had a reason and sought to accomplish a definite object, namely, to prevent the manufacture and sale of yellow oleomargarine because it looks like and competes with colored butter; but what we do mean to assert is that it was actuated by no reason which, under the Constitution of the United States, it could properly entertain, for in respect of internal commerce it has no police power whatever. A commodity cannot be taxed at a prohibitive rate simply because it necessarily resembles and competes with another. Such a reason furnishes no legitimate basis for the object sought to be accomplished. Even under the police power, a State could not prohibit an article harmless in itself merely because it looked like another with which it competes: it could only do so in order to prevent fraud.

Now, the power to tax undoubtedly involves the power to classify for purposes of taxation; but due process of law requires that classification shall be something more than mere arbitrary selection. What test then is to be applied for the determination of whether there has been legitimate classification or a mere arbitrary selection? Whatever else may be done, it must surely be that discrimination calculated only to deprive one class of persons of their occupations or property for no other purpose than to benefit another class of persons who are their business competitors is, legally speaking, a mere arbitrary selection. Thus, in the cases at bar, we find a tax of ten cents per pound upon

oleomargarine solely because it looks like and competes with butter, which is exempted from any tax. The tax depends solely upon the article being a substitute for an untaxed commodity. What difference then exists between these two articles to justify this discrimination? In their chemical composition there is substantially no difference and they are used for the same identical purpose. They compete directly in the market, but a necessary element of the marketability of each product is a certain shade of yellow which must be imparted before it can be sold. The cost of production is such that yellow oleomargarine cannot be sold in competition with colored butter if the ten cent tax be paid. Since uncolored oleomargarine cannot be sold or compete with colored butter, the result is the prohibition of the manufacture and sale of all oleomargarine in competition with butter. Therefore, the mere fact of necessary resemblance is made to support the accomplishment of but one object, namely, the suppression of the oleomargarine industry for the benefit of the butter industry. No such power was entrusted to Congress by the Constitution. It is not legitimate classification, but mere arbitrary selection which deprives of liberty and property one body of individuals for the benefit of another. As Mr. Justice Harlan said of a state statute in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 563:

> "Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

What Mr. Justice Brewer said in *Gulf, Colorado & Santa Fe R'y* v. *Ellis*, 165 U. S. 150, 154, is equally applicable to the Fifth Amendment, viz.:

> "While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action. . . . The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

In *The State* v. *Loomis*, 115 Missouri, 307, 314, cited and quoted with approval in the *Ellis* case, Black, J., said:

> "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classi-

fication for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

It is no longer open to question that the right to earn one's livelihood by any lawful calling constitutes the liberty and property of the individual and one of the inalienable privileges and immunities of every citizen of the United States which are secured by the Constitution. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 757, 764; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *People* v. *Marx*, 99 N. Y. 377, 386, and *People* v. *Gillson*, 109 N. Y. 389, 399.

The contention of the plaintiffs, if adopted, would not limit the taxing power of the federal government. It would leave it free to determine the extent and method of taxation in all cases where taxation is necessary and proper to carry into execution the powers delegated by the Constitution, and to call upon the people to contribute even to the last penny if necessary to defend or preserve the Union or promote the common welfare of the Nation. It would take away no power that a civilized government ought to exercise. It would declare that in the exercise of the taxing power Congress may not impose prohibitory taxes upon internal products based upon the fact that a manufactured article resembles and competes with another product which is not taxed; in other words, that it may not destroy the property of one class of its citizens for the benefit of another class. Such a decision would be but following the duty which Chief Justice Marshall said would be imperative if the court were satisfied that a given stat-

ute purporting to lay a tax was in truth a mere pretext for unauthorized prohibition.

IV.

THE PROVISION OF SECTION 14 OF THE ACT CONFERRING JUDICIAL POWER UPON THE COMMISSIONER OF INTERNAL REVENUE.

The act in question is subject to the additional objection that the power to decide finally what articles are to be taxed cannot be conferred upon the Commissioner of Internal Revenue, who is only an administrative officer. Sec. 14 of the act provides as follows:

> "And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final."

The invalidity of this clause would seem to be established by the decision in *United States* v. *Eaton*, 144 U. S. 677, 688, where the court, speaking through Mr. Justice Blatchford, said:

> "It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offence punishable under § 18 of the act."

See also to the same effect, *United States* v. *Maid*, 116 Fed. Rep. 650, 651; *United States* v. *Blasingame*, 116 Fed. Rep. 654.

The case of *In re Kollock, Petitioner*, 165 U. S. 526, 533, did not present this point. That decision passed

only upon the power of Congress to authorize the Commissioner of Internal Revenue to prescribe regulations as to marks, stamps and brands. An entirely different question is involved in the attempt to invest the Commissioner with power to 'decide' *finally* how an article shall be taxed. No such judicial power can be granted except to the courts.

This objection is peculiar to the *Cliff* and *McCray* cases. In the *Cliff* case, the package bore a tax-paid stamp of one-fourth of one cent per pound (*Cliff* record, p. 8). The theory of the prosecution was that the package had not been "stamped according to law," within the penal intent of section 11 of the act, because it did not have a tax-paid stamp at the rate of ten cents per pound, under the requirements of section 8. The theory of the defense was that the tax required by section 8 on the package in evidence was only one-fourth of one cent per pound, because the oleomargarine was "free from artificial coloration that causes it to look like butter of any shade of yellow." The issue, therefore, was as to whether or not the package in question contained 'artificial' coloration within the true meaning of the act of Congress. Upon this issue the facts were undisputed. The government showed that the article was of the color of June butter, and that this color was imparted to it by the admixture of palm oil in its manufacture (*ib.*, p. 8). The defendant showed by competent testimony that palm oil is a vegetable oil derived from the fruit of a certain kind of palm which grows in East Africa, that it is a wholesome, edible oil, containing all the chemical constituents of butter, except butyrin, which gives to butter its flavor, that it is used by the natives of

the country where it is produced to mix with their food, that it is reddish-yellow in appearance and a very small proportion of it is sufficient to produce the color of June butter, that there is little, if any, difference between the taste of oleomargarine made in this way and the taste of butter, that it is quite as digestible as butter and is very cheap, that the oleomargarine thus produced is substantially the same article as good butter, and that the nature of palm oil is such that its use *is desirable as an ingredient in the manufacture of oleomargarine aside from its yellow color* (*ib.*, pp. 10–12). The government made no objection to this evidence, and offered none to question or dispute it (*ib.*, p. 12), except to show that the Commissioner of Internal Revenue had finally decided that the use of palm oil in the manufacture of oleomargarine does constitute 'artificial' coloration, and had instructed the prosecuting witness, a Deputy Collector of Internal Revenue, that oleomargarine thus produced is subject to the tax of ten cents per pound (*ib.*, pp. 8–10).

The facts being wholly undisputed, there was presented a pure question of law, namely, whether the admixture of palm oil in the manufacture of oleomargarine constituted 'artificial' coloration within the meaning of the act. The conviction necessarily was based upon the assumption that this question had been foreclosed by the decision of the Commissioner under authority of section 14, and that the defendant Clift was not entitled to a judicial trial upon the question whether the article he sold was or was not intended by Congress to be taxed at the ten cent rate.

In the *McCray* case it was admitted by the govern-

ment that the only coloring matter contained in the package of oleomargarine therein involved was that universally used in the United States to color butter and was contained in creamery butter which had been purchased in the open market and used in the manufacture of the oleomargarine in question as one of its elementary and necessary ingredients according to a formula used in the course of business. The Commissioner of Internal Revenue had decided that if *artificially* colored butter is used "as a component part of the finished product oleomargarine (and that finished product looks like butter of any shade of yellow), as the oleomargarine is not free from *artificial* coloration, the tax of ten cents per pound will be assessed and collected." Oleomargarine Regulations, U. S. Int. Rev., June, 1902, p. 18.

Conceding *arguendo* that Congress would have the power to tax oleomargarine containing palm oil or colored butter at ten cents per pound, nevertheless it could not authorize the Commissioner of Internal Revenue so to decide and to tax or not to tax according to his discretion. He is not a judicial officer; he has no judicial machinery; he need not even be a lawyer; he may act upon such facts as may be presented to him, and after such investigation as he may choose to make, and his decision is not subject to judicial review; indeed, he may decide on mere inspection and hence according to the hidden operation of his senses. Though Congress may invest the officers of the executive department of the government with all of the powers necessary to the adequate execution of its

constitutional laws and may confer upon them the power to determine the existence of facts as the foundation of such action as may be necessary to give effect to the declared purpose of Congress, it cannot delegate to any officer or department of government the power to 'decide' finally what articles shall or shall not be taxed.

According to the ruling of the Commissioner, the word 'artificial' is made to include 'natural,' a word of opposite meaning, for it is undisputed that the yellow color of palm oil is a *natural* color, and the exception would be, not of oleomargarine 'free from artificial coloration' but of oleomargarine 'free from coloration.' The established rule is that the intention to tax in a particular manner must be expressed in clear and unambiguous language, else it cannot be enforced, and that words of exception are to receive a liberal rather than a restricted construction, to the end that the burdens imposed upon individuals may be confined rather than extended. The rule together with its supporting authorities is stated in *Eidman* v. *Martinez*, 184 U. S. 578, 583. See also *Adams* v. *Bancroft*, 3 Sumner, 384, 387; *Schoenemann* v. *United States*, 119 Fed. Rep. 584, 587; *In re Southern Pac. Co.*, 82 Fed. Rep. 311, 313; 87 Fed. Rep. 863; *Matheson & Co.* v. *United States*, 71 Fed. Rep. 394, 395; *Rice* v. *United States*, 53 Fed. Rep. 910, 911; *Dean* v. *Charlton*, 27 Wis. 522, 526.

It is not contended that the invalidity of this provision contained in section 14 affects the other provisions of the act. Omitting the clause or declaring the legal

effect to be that the ruling of the Commissioner is only presumptively correct, will leave the act complete and harmonious. To the individual, however, will then be accorded a trial in due form upon the issue whether palm oil or any other natural product or colored butter does or does not constitute 'artificial coloration' within the true meaning of the statute. Upon that question, we have been denied a day in court; and, acting as an appellate tribunal, this court will not determine that issue but order it to be tried by the court below in accordance with the usual practice.

V.

EFFECT OF THE INVALID AMENDMENT UPON THE ORIGINAL ACT.

The power of Congress to lay a tax of two cents per pound upon oleomargarine, as was done under section 8 of the original oleomargarine act, is not questioned in these cases. It is true, in the *Broadwell* case, no tax whatever had been paid; but this was upon the ground that the amendment of May 9, 1902, being void, no tax provision remained in force. This was done for the purpose of presenting every phase of the act, and not because the plaintiffs in error are not willing to pay a fair tax to the national government. Although an unconstitutional statute cannot, by mere implication alone, operate to repeal a prior enactment, still an expression of such an intention may as well be contained in an unconstitutional statute as any

other. *Tims* v. *The State*, 26 Ala. 165, 170; *County of Orange* v. *Harris*, 97 Cal. 600, 602; *People ex rel.* v. *Fleming*, 7 Colo. 230, 236; *Meshmeier* v. *State*, 11 Ind. 482, 489; *Childs* v. *Shower*, 18 Iowa, 261, 272; *Ely* v. *Thompson*, 3 A. K. Marsh. 70, 73; *Sullivan* v. *Adams*, 3 Gray, 476, 478; *Campau* v. *The City of Detroit*, 14 Mich. 276, 285; *Devoy* v. *Mayor, &c., of New York*, 35 Barb. 264, 270; 36 N. Y. 449, 451; *City of Portland* v. *Schmidt*, 13 Oreg. 17, 20; *Shepardson* v. *Milwaukee and Beloit R. Co.*, 6 Wis. 605, 615; *State ex rel. Rogers* v. *Judge of County Court*, 11 Wis. 50, 55. And a declaration that a prior statute is amended to read in the language of the amendatory statute amounts to an unequivocal expression of an intention to repeal the original act so far as concerns any vitality distinct from the amendatory act. *People* v. *Wilmerding*, 136 N. Y. 363, 369, per Mr. Justice Peckham; *Matter of Estate of Prime*, 136 N. Y. 347, 355; *Goodno* v. *City of Oshkosh*, 31 Wis. 127, 129. Congress cannot be held to have intended to prohibit oleomargarine provided the Constitution will permit it to do so and by the same act to tax it in case the prohibition were unconstitutional. To so hold would be judicial legislation. *Spraigue* v. *Thompson*, 118 U. S. 90, 94; *James* v. *Bowman*, 190 U. S. 127, 141.

Conclusion.

It results that sections 8 and 14 of the act of Congress of August 2, 1886, as amended by the act of Congress of May 9, 1902, should be declared unconstitutional for

the reasons above discussed, and that the judgment in each case should be reversed.

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Washington, October Term, 1903.